Supreme Court, U.S.
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92-981

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992 TERM

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION ON APPEAL

Whether the Court below erred in upholding the District Court's ruling that defendant Allstate was entitled to summary judgment on each of plaintiff's claims, where there were genuine issues of material fact regarding what the plaintiff was told about the policy coverage and what constituted the contract of insurance where the policy was never sent to the plaintiff until after the loss and the plaintiff alleges fraudulent intent on the part of the insurance company at the time of the sale.

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RCW 48.22.030(2) p. 13

Thod S. Madsen, individually and as Personal Representative of the Estate of Miyong Madsen, his deceased wife and as Guardian for Gina K. Madsen, the minor child of Thod S. Madsen and Miyong Madsen, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment affirming the United States District Court for the District of Oregon grant of summary judgment. The respondent is Allstate Insurance Company, an Illinois corporation.

OPINION BELOW

On April 12, 1991, United States District Court Judge Helen Frye issued an opinion, order and judgment granting summary judgment to the defendant Allstate Insurance Company. Appendix B. The opinion is reported as Madsen v. Allstate Ins. Co., 760 FSupp 1389 (D.Or. 1991).

JURISDICTION

The initial order of the United States Court of Appeals for the Ninth Circuit affirming the District Court judgment is dated July 16, 1992. Appendix A. On September 11, 1992, a Petition for Rehearing with suggestion for Rehearing En Banc was denied. Appendix C; Appendix D. This petition for certiorari is timely pursuant to Supreme Court Rule 13.4. Jurisdiction of this Court over this matter is invoked pursuant to 28 USC §1254(1).

STATEMENT OF THE CASE

This petition concerns a Ninth Circuit affirmance, without substantive opinion, of the judgment of the United States District Court for the District of Oregon. The District Court granted summary judgment to the defendant Allstate upon all of the claims of the plaintiff Madsen.

A. Contentions of the Parties

At issue is the nature of coverage under a $1,000,000 policy of insurance designated by Allstate as an "umbrella policy." Allstate insists that the policy does not include uninsured/underinsured motorist (UIM) coverage beyond that contained in the underlying automobile policy. Madsen contends that, under the facts of this case - where the policy itself was not delivered, the umbrella insurance contract does include UIM coverage.

B. Procedural History

On July 13, 1990, Thod S. Madsen, individually and as Personal Representative of the Estate of Miyong Madsen, his deceased wife and as Guardian for Gina K. Madsen, the minor child of Thod S. Madsen and Miyong Madsen, filed a complaint against Allstate Insurance Company, an Illinois Corporation, in the Circuit Court of the State of Oregon for the County of

Multnomah. The complaint alleged causes of action for Breach of Contract, Reformation, Breach of Contract to Provide Insurance, Negligence, Fraud, Breach of Warranty, Breach of Warranty of Fitness for a Particular Purpose, Unfair Trade Practices, Estoppel and Bad Faith.

The case was subsequently removed on Defendant's motion to federal Court on the basis of diversity of citizenship, 28 USC §1332. Because Madsen is a resident of the State of Washington and the insurance policy at issue was purchased in the State of Washington, it was agreed by the parties that for state law issues Washington law should apply.

On February 28, 1991, Defendant Allstate filed a Motion for Summary Judgment on all causes of action in Madsen's complaint. Madsen filed an opposition to the motion. Madsen conceded summary judgment on the fitness for a particular purpose claim. On April 1, 1991, a hearing was held before United States District Court Judge Helen Frye and both parties presented oral arguments. On April 12, 1991, Judge Frye rendered summary judgment in favor of Defendant. Appendix B.

Madsen appealed the decision to the United States Court of Appeals for the Ninth Circuit. The panel found the case suitable for submission on the record and briefs without oral

argument.

On July 16, 1992, the Ninth Circuit issued an opinion that read in its entirety: "This matter is affirmed for the reasons stated by the district judge." Appendix A. Madsen filed a timely petition for rehearing. Appendix C. Rehearing was denied by an Order filed September 11, 1992. Appendix D.

C. Facts

In October 1987, Madsen owned an Allstate automobile insurance policy and an Allstate homeowner's policy. On October 16, 1987, Madsen telephoned an Allstate insurance agent with whom he had done business for many years, Mr. Howard McGraw, and inquired about how much it would cost to purchase an umbrella policy with the automobile and homeowner's policies as underlying insurance.

There is a question of fact regarding what Mr. McGraw told Madsen about the policy ordered. Mr. McGraw recalls that he probably mentioned the business purpose, aircraft and watercraft exclusions; Mr. Madsen recalls that Mr. McGraw did not mention any Uninsured Motorist exclusion. The only two things that are agreed are the fact that the "umbrella" policy was ordered over the telephone, and the fact that Mr. McGraw quoted Madsen a price. The rest of the facts concerning that conversation are still

in dispute.

Soon after the telephone conversation, Mr. McGraw sent Madsen a binder for a Personal Umbrella Policy in the amount of $1,000,000.00. In the comments section of the binder the underlying automobile and homeowner's policies are referenced by policy number. There is no notation of any exclusion from coverage.

On or about November 11, 1987, Madsen received from Defendant a document entitled "Personal Umbrella Policy Declarations," which was simply the bill for the "umbrella" policy.

On December 17, 1988 there was an automobile accident in Lane County, Oregon which resulted in the death of Madsen's wife and injuries to his daughter, along with injuries to the other passengers in the car. The driver at fault carried minimum insurance, insufficient to compensate the victims fully.

Allstate paid the entire limits of Madsen's $300,000 underinsured motorist coverage pursuant to the underlying automobile insurance policy.

Allstate conceded that Madsen did not receive the "umbrella" policy itself until after the automobile accident.

Madsen testified by affidavit that if he had received the "umbrella" policy he would have read it, and upon realizing that it

did not purport to cover uninsured/underinsured motorist incidents he would have immediately rejected the policy and found the coverage he wanted through a different insurance company. The affidavit was not contradicted by Allstate.

Madsen made demand upon Allstate for payment under the umbrella policy for excess underinsured motorist coverage and Allstate refused to pay.

The action was filed in the Circuit Court of the State of Oregon, and was removed the United States District Court for the District of Oregon by the defendant Allstate. Allstate moved for summary judgment which was granted. The Ninth Circuit affirmed the lower court judgment "for the reasons stated by the district judge." The Ninth Circuit memorandum was "Not For Publication."

REASONS FOR GRANTING THE WRIT

A. Introduction

The United States Court of Appeals for the Ninth Circuit, in affirming the District Court and adopting the District Court's opinion without comment, has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

At the core of the departure from the accepted course of judicial proceedings is the District Court's grant of summary judgment where there were clear genuine issues of material fact present in the case, and the District Court's interpretation of the facts in the case in favor of the moving party, rather than in favor of the non-moving party.

B. Summary Judgment

A Trial Court should only grant summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on the file together with the affidavits ... show that the moving party is entitled to judgment as a matter of law." FRCP 56(c); Alaska v. United States, 754 F2d 851 (CA9, 1985), cert. den. 474 US 968.

Summary judgment is appropriate when the moving party can demonstrate that there is no genuine issue of material fact and is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 US 317, 322 (1986).

The burden to establish the **absence** of a material issue of fact for trial is on the moving party. British Airways Bd. v. Boeing Co., 585 F2d 948, 951 (CA9, 1978). Because it is a drastic remedy, the movant must establish entitlement to summary judgment beyond a reasonable doubt. Norton v. Liddel, 620 F2d 1375, 1381

(CA10, 1980).

All inferences drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654 (1962). Where different ultimate inferences can be reached summary judgment is not appropriate. Sankovich v. Life Ins. Co. of N.Am., 638 F2d 136, 140 (CA9, 1981). Furthermore, summary judgment is inappropriate where credibility is at issue. Credibility issues are appropriately resolved only after an evidentiary hearing or full trial. SEC v. Koracorp. Indus., 575 F2d 692, 699 (CA9, 1978), cert.den. 439 US 953.

C. Genuine Issues of Material Fact

There are genuine issues of material fact regarding whether or not the binder constituted a contract of insurance where it is undisputed by the defendant that plaintiff did not receive the policy of insurance.

It should first be noted that in the Trial Court there may have been an issue of fact as to whether or not Madsen ever received the umbrella policy itself prior to the accident. For the purposes of Defendant's Motion for Summary Judgment, defendant Allstate conceded that plaintiff did not receive the policy itself until after the accident.

On the other hand, the opinion of the district judge recites that "Allstate concedes that there is a dispute of fact between the parties as to whether Madsen received a copy of the policy." Appendix B-7. In asserting that there was a dispute over the issue of whether Madsen ever received the policy (even in the face of Allstate's concession for purposes of summary judgment that he did not receive it) the district judge should have been compelled to conclude that Madsen never received the policy. On that issue, summary judgment should have been denied. Controverted allegations may only be resolved by trial on the merits, not summary judgment. Free v. Bland, 369 US 663 (1962).

Since it must be taken as a matter of fact that Madsen did not receive the policy, the issue of what constituted the policy of insurance must be determined. There is a material issue of fact as to what Allstate's insurance agent told Madsen when he called to order an umbrella policy. The agent, Howard McGraw, insists that he told Madsen that the umbrella provided excess liability coverage. However, Madsen says there was no discussion of the policy being limited to liability only - that there was no explanation of exclusions. Resolving the issue in favor of the non-moving party, it must be concluded for the purposes of a motion for summary judgment that McGraw said nothing to Madsen regarding

the policy being liability only, leading him to believe that he would receive a true umbrella policy rather than the half-umbrella Allstate purported to sell.

Madsen's undisputed and uncontradicted affidavit testimony was: "If Mr. McGraw had told me or if I had received the policy and determined that there was no coverage for uninsured motorists I would not have continued with this policy but instead would have acquired a true umbrella policy from another company that included coverage for all of my insurance needs." Appendix E-3 - E-4.

Under Washington law, in a case where there was no evidence that the insured had read the policy that had been delivered, the Washington court of Appeals has held that the insured will be held to the provisions contained in the policy. Webster v. State Farm Mut. Auto. Ins., 54 WaApp 492, 774 P2d 50 (1989). The Webster court cited Richardson v. Brown, 433 F2d 926 (CA10, 1971), finding it persuasive. In Richardson, at p. 927, the court found:

> "There is no evidence that the insured would have rejected the policy if, after receipt, she had read and was unwilling to accept the cancellation clause. There is no intimation that the method of giving notice of cancellation was an essential element of the contract, and there is no claim of fraud or other misconduct on the part of the insurer."

The converse is true here. There is affirmative evidence that if the policy been delivered, Madsen would have read and rejected it for failing to include UIM coverage, an essential element of the contract he intended to enter into. In addition, Madsen's affidavit also points out that if the insurance agent had informed him that there was no UIM coverage under the "umbrella" policy he would not have purchased it. Clearly UIM coverage was an essential element of the contract. The complaint in this matter specifically alleged fraud on the part of the insurance company for concealing the lack of UIM coverage under the "umbrella" policy. There was at least an issue of fact for trial about what was told to Madsen about the existence of UIM coverage or lack thereof, and the intent of the insurance company in failing to inform Madsen. With those genuine issues of material fact present in the case, it was improper for the District Court to grant summary judgment, and improper for the Ninth Circuit to affirm that judgment.

On the other hand, there is no evidence here that the policy was delivered to be available for Madsen to read, and Allstate conceded that it was not delivered. Where there is a

question of deliverance of the policy, the issue is the terms of the contract of insurance. It is a matter of fact to be determined by a jury what is generally meant by the term "umbrella policy" and what Madsen would have done if he had been made aware of Allstate's purported exclusion.

It is undisputed that Madsen received the binder, and as noted by the District Court Judge: "There are no notations of any exclusions in the binder." What remains to be determined is the fact issue of what was the contract of insurance that was requested and purchased. This is not a proper matter for summary judgment, but must be left to the trial of this matter. Granting summary judgment was improper, as was the Ninth Circuit Court's affirming the decision of the trial court.

What is truly at issue in this case is the effort of an insurance company to deny coverage under a policy of insurance improperly called an "umbrella" policy, where it leaves half of the insured still getting wet. Where it was conceded by Allstate that the insured never got a copy of the policy, there is a genuine issue of material fact about what constitutes the contract of insurance. Summary judgment should have been denied by the District Court,

and should have been reversed and remanded by the Ninth Circuit.

STATUTE INVOLVED

Madsen, the petitioner herein, does not concede that the following statute is applicable to this case. However, it has been involved in the proceedings below.

> "No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured."

Revised Code of Washington, Chapter 48.22
RCW 48.22.030(2)

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed, and the case remanded for trial on the merits in order to settle the genuine issues of material fact present.

Respectfully submitted,

By: _____

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Defendant-Appellee.

Docket No. 91-35538
Filed: July 16, 1992

MEMORANDUM

NOT FOR PUBLICATION

Before: GOODWIN, TANG and THOMPSON, Circuit Judges.

This matter is affirmed for the reasons stated by the district judge.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Defendant-Appellee.

Docket No. 91-35538

JUDGMENT

APPEAL FROM the United States District Court for the District of Oregon (Portland) .

THIS CAUSE came on to be heard on the Transcrip of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 07/16/92

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Defendant.

Case No. CV 90-834-FR
Filed: April 12, 1991

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendant and against plaintiff.

DATED this 12 day of April, 1991.

/s/ Helen J. Frye
HELEN J. FRYE
United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Defendant.

Case No. CV 90-834-FR
Filed: April 12, 1991

ORDER

IT IS HEREBY ORDERED that defendant's motion for summary judgment (#21) is GRANED. The court will file a judgment in favor of the defendant as of this date.

DATED this 12 day of April, 1991.

/s/ Helen J. Frye
HELEN J. FRYE
United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,
Plaintiff,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,
Defendant.

Case No. CV 90-834-FR
Filed: April 12, 1991

OPINION

The matter before the court is defendant's motion for summary judgment (#21) dismissing the amended complaint.

Plaintiff, Thod S. Madsen, brings this action for breach of a contract of insurance against the defendant, Allstate Insurance Company (Allstate), and, in the alternative, for reformation of the contract of insurance. Madsen also alleges claims from breach of contract to provide insurance, and for negligence, fraud, breach of express warranty, breach of warranty-fitness for a particular purpose, unfair trade practices, estoppel, and bad faith.

UNDISPUTED FACTS

Madsen is a businessman experienced in retail operations and the distribution of electronic classical organs. In October, 1987, Madsen owned an automobile liability insurance policy and

a homeowner's insurance policy, both issued by Allstate.

On October 16, 1987, Madsen telephoned his Allstate insurance agent, Howard McGraw, and inquired about the cost of an umbrella policy for his automobile and homeowner;'s insurance policies. McGraw quoted Madsen a price, and Madsen agreed by telephone to purchase the Allstate umbrella policy.

Neither Madsen nor McGraw have a clear memory of the telephone conversation. McGraw states in his affidavit that he indicated to Madsen "that the umbrella insurance extends the liability overage of his automobile and homeowner's insurance." Affidavit of McGraw, p. 2. Madsen recalls that McGraw said nothing to him about the nature of the coverage supplied under an umbrella policy and merely quoted a price. Madsen and McGraw agree, however, that there was no specific discussion of any exclusions in the telephone coversation.

Madsen intended that the umbrella policy provide coverage in excess of his underlying insurance policy without exclusion. McGraw knew that Allstate's umbrella policy is an excess liability insurance policy and would not extend the coverage of Madsen's underlying uninsured motorist coverage in his automobile policy. Allstate does not sell excess uninsured motorist insurance.

Soon after the telephone conversation, Allstate sent

Madsen a binder which he received for a Personal Umbrella Policy in the amount of $1,000,000.00. The binder is entitled "PERSONAL UMBRELLA POLICY APPLICATION" and was accompanied by a separate notice which stated that "[i]f you do not receive your policy within 15 days from the date of this application DIRECTLY NOTIFY THE COMPANY AT ITS HOME OFFICE." In the comments section of the binder, Madsen's underlying automobile and homeowner's policies are referenced by policy number. There are no notations of any exclusions in the binder.

On or about November 11, 1987, Madsen received a document intitled "PERSONAL UMBRELLA POLICY DECLARATION" which describes coverages as "BASIC LIABILITY" and states a yearly premium of $140.00. Madsen received this document, tore the payment coupon from it, and returned the coupon together with payment to Allstate. The declaration references Allstate's Personal Umbrella Policy, Document Number U9910-1. There is a dispute as to whether Madsen received a copy of the Personal Umbrella Policy.

The Personal Umbrella Policy that Madsen purchased states that "Allstate will pay when the insured becomes legally obligated to pay for personal injury or property damage caused by

an occurence." The policy contains no provision for extending the uninsured motorist coverage to the limits of the umbrella policy.

On December 17, 1988, there was an automobile accident in Lane County, Oregon which resulted in the death of Madsen's wife and injury to his daughter and to other passengers in the car. The driver of the car who was at fault carried minimum insurance, insufficient to compensate fully the victims of the accident. Allstate paid the $300,000 limits of Madsen's uninsured motorist coverage pursuant to the underlying automobile insurance policy. Madsen called McGraw and requested a copy of the umbrella policy.

Thereafter, Madsen's counsel demanded that Allstate pay the limits of the umbrella policy. Allstate refused on the grounds that the umbrella policy covered only liability claims made against Madsen and did not extend his uninsured motorist coverage.

Madsen filed this action seeking to recover the limits of the umbrella policy on theories of breach of contract and/or fraud or, in the alternative, to reform the insurance contract to reflect his understanding of the insurance coverage he purchased from Allstate.

CONTENTIONS OF THE PARTIES

Allstate contends that it is entitled to judgment in its favor

as a matter of law because the policy it issued to Madsen bound Allstate to provide coverage only when Madsen became legally obligated to pay or personal injury or for property damage. Allstate points out that the policy by its express terms does not extend the limits of Madsen's uninsured motorist coverage. Allstate contends that there is strong evidence that Madsen knew at the time he purchased his umbrella policy that it was a liability policy, and that even if Madsen mistakenly believed that the policy provided excess uninsured motorist coverage, there is no legal basis for extending Madsen's coverage beyond that specifically requested by him.

Allstate contends that in insurance terminology, an "umbrella" policy is excess personal liability policy and does not contain excess uninsured motorist coverage. Allstate relies upon the fact that McGraw made no representation concerning excess uninsured motorist coverage and that Allstate does not sell excess uninsured motorist insurance. Allstate concedes that there is a dispute of fact between the parties as to whether Madsen received a copy of the policy that he purchased in October of 1987, but contends that this dispute is not material in that there is sufficient evidence that Madsen knew or should have know [sic] that the policy he purchaed was a liability insurance policy.

Madsen contends that an umbrella policy is not be definition only a liability insurance policy. Madsen contends that the policy Allstate claims to have sold to him is not the umbrella policy that Allstate agreed to sell to him or the umbrella policy that he ordered. Madsen explains that an umbrella policy is intended to provide protection beyond primary coverage, and that Allstate's policy limited to liability only provides partial umbrella coverage.

Because there is a dispute over whether he received a copy of the policy, Madsen contends that for the purposes of this motion for summary judgment, the court must determine the limits of coverage from the four corners of the binder which Allstate issued to Madsen. Madsen asserts that the binder refers to his automobile and to his homeowner's policies and contains no exclusion of uninsured motorist coverage from the excess coverage.

APPLICABLE STANDARD

Summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden to establish the absence of a material issue of fact for trial

is on the moving party. British Airways Bd. v. Boein Co., 585 F.2d 946, 951 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). This burden "may be discharged by 'showing' ... that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). The burden shifts to the nonmoving party to "go beyond the pleadings and ... designate 'specific facts showing that there is a genuine issue for trial'" Id. at 324.

Assuming there has been adequate time for discovery, summary judgment should then be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. All inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Where different ultimate inferences can be reached, summary judgment is not appropriate. Sankovich v. Life Ins. Co. of N. Am., 638 F.2d 136, 140 (9th Cir. 1981). Finally, summary judgment is inappropriate where credibility is at issue. Credibility issues are appropriately resolved only after an evidentiary hearing or full trial. SEC v. Koracorp. Indus., 575 F.2d 692, 699 (9th Cir.), cert. denied 439 U.S. 953 (1978).

ANALYSIS

Breach of Contract

Madsen's claim for breach of contract is that Allstate failed to provide coverage in an amount equal to the limits of the umbrella policy that Madsen purchased. Madsen recognizes that the umbrella policy issued does not extend the coverage provided by his uninsured motorist policy. Nonetheless, he contends that the umbrella policy that was issued to him was not the umbrella policy that he purchased.

The binder sent to Madsen contained no contract terms other than that the insured wishes to purchase a "PERSONAL UMBRELLA POLICY." The umbrella policy referred to in the binder and purchased by Madsen was a liability insurance policy and had nothing to do with the limits of the uninsured motorist coverage provided by Madsen's automobile insurance policy. Madsen received the billing declaration from Allstate, which expressly describe the policy he purchased as a "basic liability" insurance policy. Madsen purchased the basic liability insurance policy that Allstate offered to him. There is no factual or legal basis to support Madsen's claim that Allstate's binder established a contract of $1,000,000.00 in excess uninsured motorist coverage.

Allstate is entitled to summary judgment on Madsen's

breach of contract claim.

Reformation

Madsen contends in his second claim for relief that the contrat of insurance should be reformed to reflect his intent that the coverage in the umbrella policy include excess uninsured motorist protection. In order to justify the granting of reformation, there must be a mutual mistake of the parties to the transaction. Wilson v. Westinghouse Elec., 85 Wash.2d. 78, 84, 530 P.2d 298 (1975); Williams v. Fulton, 30 Wash.App. 173, 176, 632 P.2d 920 (1981). There is no evidence to support this claim because there is no evidence that the mistake, if there was a mistake, was a mutual mistake.

Allstate is entitled to summary judgment on Madsen's second claim for reformation.

Breach of Contract to Provide Insurance

Madsen alleges that Allstate breached its contract with Madsen to provide him with uninsured motorist coverage ointhe amount of $1,000,000.00. There is no evidence that Allstate agreed to provide Madsen with uninsured motorist coverage in the amount of $1,000,000.00.

Allstate is entitled to summary judgment on Madsen's third claim for breach of contract to provide insurance.

Negligence

Madsen contends that McGraw was negligent in not advising him that the umbrella policy he purchased did not include uninsured motorist coverage.

An insured has a duty to instruct the insurance agent of his insurance needs. If the instructions bear different interpretations, the agent is justified in acting in good faith upon a reasonable construction of the insured's instructions. American States Ins. Co. v. Breesnee, 49 Wash. App. 642, 745 P.2d 518 (1987).

Madsen telephoned McGraw and requested a price quotation for Allstate's Personal Umbrella Policy. McGraw gave Madsen the quotation and sold Madsen the umbrella policy that Allstate has for sal. There was no discussion of uninsured motorist coverage. McGraw had no duty to inquire of Madsen as to whether Madsen wanted what he asked to purchase from Allstate. Madsen could have asked Allstate whether the policy he purchased included excess uninsured motorist coverage. He did not do so. There is no factual or legal basis for this court to conclude that there is a question of fact as to whether McGraw acted negligently in this transaction.

Allstate is entitled to summary judgment on Madsen's fourth claim for negligence.

Fraud

In his fifth, sixth and seventh claims for relief, Madsen alleges that Allstate defrauded him by providing him with an umbrella liability insurance policy which did not include uninsured motorist protection. There is no evidence in this case that Allstate or McGraw attempted to or did in any way mislead Madsen or make any misrepresentations to Madsen. The only evidence is that Allstate and McGraw provided Madsen with what he requested, Allstate's umbrella policy for his automobile and homeowner's insurance policies.

Allstate is entitled to summary judgment on Madsen's fifth, sixth and seventh claims for relief for fraud.

Breach of Warranty

In his eighth and ninthj claims for relief, Madsen alleges that Allstateexpressly warranted that it would provide $1,000,000.00 in edxscess uninsured motorist coverage and breached that warranty. There are no facts to support the claim that Allstate made such a warranty to Madsen. There are no facts in this record to support Madsen's claim that Allstate agreed to provide excess uninsured motorist coverage to Madsen.

Allstate is entitled to summary judgment on Madsen's eighth and ninth claims for relief for breach of warranty.

Unfair Trade Practices

Madsen contends that the representations of Allstate were deceptive in light of the fact that Madsen wanted excess uninsured motorist coverage. There is no evidence that Allstate knew that Madsen wanted excess uninsured motorist coverage.

Allstate is entitled to summary judgment on Madsen's tenth claim for relief for unfair trade practices.

Estoppel

Madsen contends that Allstate represented that the policy it issued to him would include excess uninsured motorist coverage and that Allstate should be estopped from relying upon the policy that it issued. There is no factual basis to support this claim.

Allstate is entitled to summary judgment on Madsen's eleventh claim for relief for estoppel.

Bad Faith

Madsen contends that Allstate acted in bad faith in not paying the $1,000,000.00 limit of his umbrella policy. There are no facts to support this claim.

Allstate is entitled to summary judgment on Madsen's twelfth claim for relief for bad faith.

CONCLUSION

Allstate's motion for summary judgment is granted. The

court will file a judgment in favor of Allstate as of this date.

DATED this 12 day of April, 1991.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Defendant-Appellee.

Docket No. 91-35538

PETITION FOR REHEARING

Introduction

Appellant in this action petitions this Court for a rehearing of this matter to reconsider the Memorandum decision filed in this Court on July 16, 1992. In counsel's judgment, material points of fact and law were overlooked in the decision. The matters overlooked are explained below as concisely as possible. Because the Memorandum was filed by this Court on July 16, 1992, the deadline for a petition for rehearing is July 30, 1992. FRAP 40.

Due to several instances of conflicts between the decision rendered by this Court and decisions of courts of other Circuits, a rehearing en banc is suggested. Specifically, the court overlooked the standards for granting summary judgment, promulgated both by this Circuit and other Circuits, when it affirmed the opinion of

the district court.

Procedural Matters

This action was appealed to the Ninth Circuit for a grant of summary judgment to the defendant in the trial court. The panel deciding the matter at the Ninth Circuit unanimously found the case suitable for submission on the record and briefs without oral argument, pursuant to FRAP 34(a) and Circuit Rule 34-4.

The Memorandum issued states in its entirety: "This matter is affirmed for the reasons stated by the district judge." For this reason, this petition for rehearing must address points of fact and law overlooked by the district judge.

Summary Judgment

A Trial Court should only grant summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on the file together with the affidavits ... show that the moving party is entitled to judgment as a matter of law." FRCP 56(C).

The burden to establish the **absence** of a material issue of fact for trial is on the moving party. British Airways Bd. v. Boeing Co., 585 F2d 948, 951 (CA9, 1978). Because it is a drastic remedy, the movant must establish entitlement to summary judgment beyond a reasonable doubt. Norton v. Liddel, 620 F2d 1375, 1381 (CA10, 1980), Westland Energy, 1981-1, Ltd. v. Bank of

Commerce, 603 FSupp 698, 713 (ND Okla, 1984).

All references drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654 (1962). Where different ultimate inferences can be reached summary judgment is not appropriate Sankovich v. Life Ins. Co. of N.Am., 638 F2d 136, 140 (CA9, 1981). Furthermore, summary judgment is inappropriate where credibility is at issue. Credibility issues are appropriately resolved only after an evidentiary hearing or full trial. SEC v. Kora Corp Indus., 575 F.2d, 699 (CA9, 1978).

Genuine Issues of Material Fact

There are genuine issues of material fact regarding whether or not the binder constituted a contract of insurance where it is undisputed by the defendant that plaintiff did not receive the policy of insurance.

It should first be noted that in the Trial Court there was an issue of fact as to whether or not plaintiff ever received the umbrella policy itself prior to the accident. For the purposes of Defendant's Motion for Summary Judgment, defendant Allstate conceded that plaintiff did not receive the policy itself until after the accident. (CR 22, p. 10) On the other hand, the opinion of the district judge recites that "Allstate concedes that there is a

dispute of fact between the parties as to whether Madsen received a copy of the policy." (CR 47, p. 5) In noting that there was a dispute over the issue of whether Madsen ever received the policy (even in the face of Allstate's concession for purposes of summary judgment that he did not receive it) the district judge should have been compelled to conclude that Madsen never received the policy. On that issue, summary judgement should have been denied. Controverted allegations may only be resolved by trial on the merits, not summary judgment. Free v. Bland, 369 US 663 (1962).

Since it must be taken as a matter of fact that Madsen did not receive the policy, the issue of what constituted the policy of insurance must be determined. There is a material issue of fact as to what Allstate's insurance agent told Madsen when he called to order an umbrella policy. The agent, Howard McGraw, insists that he told Madsen that the umbrella provided excess liability coverage. (CR 24, Ex. 2, p. 4) However, Madsen says there was no discussion of the policy being limited to liability only - that there was no explanation of exclusions. (CR 24, Ex. 1, pp. 6-8) Resolving the issue in favor of the non-moving party, it must be concluded for the purposes of a motion for summary judgment that McGraw said nothing to Madsen regarding the policy being liability only, leading him to believe that he would receive a true umbrella

policy rather than the half-umbrella Allstate purported to sell.

It is undisputed that Madsen received the binder. "There are no notations of any exclusions in the binder." (CR 47, p. 3) What remains to be determined is the fact issue of what was the contract of insurance that was requested and purchased. This is not a proper matter for summary judgment, but must be left to the trial of this matter. Granting summary judgment was improper, as was this Court's affirming the decision of the trial court.

There are genuine issues of material fact regarding whether or not the policy of insurance was properly issued.

The district court judge's opinion (CR 47, p. 8, p. 11) assumes that the policy of insurance was actually issued. It was disputed that the policy was ever issued (Tr. 7) so for purposes of summary judgment the opinion should have been assumed that the policy was not issued.

There are genuine issues of fact regarding the definition of an umbrella policy.

The district judge's opinion states flatly that Allstate does not sell excess uninsured motorist insurance. (CR 47, p. 3) The lower court overlooked the fact that Allstate does in fact offer UIM coverage with umbrella policies sold in Louisiana. The lower court also omits to emphasize the fact that Madsen was not

informed that Allstate does not sell UIM coverage with umbrella policies in the state of Washington. It also overlooks the fact that other insurance companies accessable to the plaintiff also offer UIM coverage with umbrella policies, and that with those other companies the insured must take the affirmative step of rejecting such coverage. (CR 31, exhibits 1 - 3)

The fact issue that was neglected by the district court's opinion was what would a reasonable purchaser of insurance mean and expect to be sold when requesting an umbrella insurance policy. This issue of fact is crucial to a determination of this case and is not a proper subject for a motion for summary judgment.

The lower court's opinion neglected to note the law regarding an insured's statement that had he received the policy he would have read and rejected it.

The lower court entirely neglected to note the law expressed in Webster v. State Farm Mutual Automobile Insurance Co., 54 WaApp 492, 774 P2d 50 (1989). In Webster, the court ruled that it would give effect to terms in a policy, even though the policy itself was never delivered. However, in that case there was no evidence that the insured would have read and rejected the policy if it had been sent. The present situation is the converse. There was affirmative evidence, neglected by the lower court, that

if the policy had been sent to Madsen he would have read and rejected it. (CR 31, exhibit 4, ¶8). These are issues of both fact and law ignored by the district court in its opinion. Summary judgment should have been denied.

CONCLUSION

Because the lower court overlooked the existence of material issues of fact when it issued its opinion, and because the lower court overlooked the law regarding rejection of an insurance policy that is actually sent, summary judgment should have been denied. It is not even a close call. It should have been impossible to grant summary judgment when the policy was never delivered to the insured.

Since this Court merely adopted the opinion of the district court, it must be presumed that this Court also overlooked those facts and law. Since there were genuine issues of material fact present, the lower court must also have overlooked the standards for summary judgment contained in decisions of this and other circuits. For that reason a rehearing en banc is suggested.

Respectfully submitted,
ROY B. THOMPSON, PC

/s/ Roy B. Thompson
Roy B. Thompson, OSB 82501
Of Attorneys for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Defendant-Appellee.

Docket No. 91-35538
Filed: September 11, 1992

ORDER

Before: GOODWIN, TANG and THOMPSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Tang and Thompson have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THOD S. MADSEN, individually; as Personal Representative of the ESTATE OF MIYONG MADSEN, his deceased wife; and as Guardian for GINA K. MADSEN, the minor child of Thod S. and Miyong Madsen,
Plaintiff,
v.
ALLSTATE INSURANCE COMPANY, an Illinois corporation,
Defendant.

Case No. CV 90-834-FR
AFFIDAVIT OF THOD MADSEN

STATE OF OREGON)
) ss.
County of Multnomah)

I, **Thod Madsen**, being duly sworn, depose and say:

1. I am the plaintiff in the above captioned action. I make this affidavit in opposition to defendant's motion for summary judgment.

2. On October 16, 1987, I telephoned Howard McGraw, an Allstate insurance agent with whom I have done business for over ten years, to request an umbrella insurance policy. My conversation with him was to the point and lasted no longer than a few minutes. He did not go into any explanations or detailed discussions with me as to what was covered by the umbrella policy. He did not mention at any time that the umbrella

insurance would only extend the liability coverage of my automobile and home-owners insurance policies. There were no specifics discussed with him other than the request for the umbrella insurance policy and the premium price. I ordered the policy.

3. My understanding of the terminology "umbrella policy" is that it is an insurance policy that increases the coverage all of the underlying insurance with no exclusions. At no time during my conversation with Mr. McGraw did he mention any exclusions. All he did was quote to me a price.

4. Mr. McGraw and I did not discuss alternative policies, nor did we discuss what other carriers in the marketplace might offer in terms of different coverage for an umbrella policy. Shortly after my conversation with Mr. McGraw I received the binder in the mail which referenced my coverage for my umbrella policy. I briefly reviewed the binder and saw that it referenced at the bottom of the page my underlying automobile and homeowner's policies by number. Nowhere on the binder did I see any exclusions from coverage for uninsured motorist coverage.

5. The binder was the last communication regarding the umbrella coverage I received from Mr. McGraw until after my wife's death. I was subsequently billed on or around November 11,

1987 by the company for the coverage and received the declarations page which contained the bill attached to the bottom. I reviewed the bill to make sure the amount was correct and paid it. I have similarly paid in subsequent years for the same coverage. I never received the umbrella insurance policy itself until after the death of my wife on December 17, 1988.

6. After the death of my wife I telephoned Mr. McGraw and informed him that I had never been sent the umbrella policy and asked him to forward a copy of it to me. He had the Allstate regional office forward along to me copies of my homeowner's and automobile insurance policies as well as the umbrella policy.

7. My understanding from my conversations with Mr. McGraw and understanding of umbrella insurance at the time I purchased this coverage was that it operated as an extension of coverage to all my policies of insurance without exception. It was only after to the death of my wife that I became aware that Allstate claimed that there were any exclusions for uninsured motorists or that the policy pertained exclusively to excess liability coverage. I view Allstate's definition of "umbrella policy" as being less than the full umbrella I believed I was ordering.

8. When I called Mr. McGraw to purchase this

insurance it was my intention that the umbrella cover all of my insurance without exclusions. If Mr. McGraw had told me or if I had received the policy and determined that there was no coverage for uninsured motorists I would not have continued with this policy but instead would have acquired a true umbrella policy from another company that included coverage for all of my insurance needs.

10. Whenever I purchased insurance with Mr. McGraw, I always acquired the maximum coverage that was available for myself and my family. It is my practice to always acquire the maximum protection that I can and I would have done so in the case of the umbrella policy also. I have now been informed that it is more common for uninsured and underinsured motorist coverage to be offered with an umbrella than not, rather than Allstate's assertion that there is no such coverage available.

/s/_____
Thod Madsen

SUBSCRIBED AND SWORN TO before me this 15 day of March, 1991.

/s/_____
Notary Public for Oregon